(3)

No. 90-1156

Supreme Court, U.S.
FILED
FEB 13 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, JOSEPH I. GIARRUSSO, LAMBERT C. BOISSIERE, JR., MICHAEL EARLY, JAMES SINGLETON, DOROTHY MAE TAYLOR, JOHNNY JACKSON and PEGGY WILSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF OF EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION OF NEW ORLEANS PUBLIC SERVICE INC. FOR A WRIT OF CERTIORARI

Of Counsel:

REID & PRIEST
RICHARD M. MERRIMAN
ROBERT S. WATERS
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-4000

PETER B. KELSEY
Vice President, Law and
Corporate Secretary
Counsel of Record

EDWARD H. COMER
Edison Electric Institute
701 Pennsylvania Ave. N.W.
Washington, D.C. 20004-2696
(202) 508-5000

Attorneys for Edison Electric Institute

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a retail ratemaking authority has the jurisdiction to nullify the Federal Energy Regulatory Commission's wholesale rate allocation order by deciding it was "imprudent" for a utility to fail to "minimize its losses" during construction of a wholesale generating facility and by barring recovery by the utility of, and thereby "trapping," wholesale costs that FERC found to be "just and reasonable" and ordered the utility to incur?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
INTEREST OF EDISON ELECTRIC INSTITUTE	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	7
ARGUMENT: THE OPINION BELOW IS OF GREAT NATIONAL IMPORTANCE SINCE, IN VIOLATING THE PREEMPTION DOCTRINE OF *NANTAHALA* AND *MP&L*, IT THREATENS THE PROPER RELATIONSHIP BETWEEN FEDERAL AND STATE REGULATION OF THE ELECTRIC UTILITY INDUSTRY	8
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:	Page
City of New Orleans v. Federal Energy Regulatory Commission, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied sub nom. State of Mississippi v. Federal Energy Regulatory Commission*, ___ U.S. ___, 110 S. Ct. 1805 (1990)	5
Eastern Edison Company v. Department of Public Utilities, 446 N.E.2d 684 (Mass. 1983)	16-17
Mississippi Industries v. Federal Energy Regulatory Commission, 808 F.2d 1525 (D.C. Cir.), *vacated in part*, 822 F.2d 1104, *cert. denied sub nom. Arkansas Public Service Commission v. FERC*, 484 U.S. 985, 108 S. Ct. 500 (1987)	5
Mississippi Power & Light Company v. Mississippi ex rel. Moore, 487 U.S. 354, 108 S. Ct. 2428 (1988)	*passim*
Nantahala Power and Light Company v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349 (1986)	*passim*
Narragansett Electric Company v. Burke, 381 A.2d 1358 (R.I. 1977) *cert. denied*, 435 U.S. 972, 98 S. Ct. 1614 (1978)	15
New Orleans Public Service Inc. v. Council of New Orleans, 491 U.S. 350, 109 S. Ct. 2506 (1989)	14-15
New Orleans Public Service Inc. v. Council of New Orleans, 911 F.2d 993 (5th Cir. 1990)	*passim*
Northern States Power Company v. Hagen, 314 N.W.2d 32 (N.D. 1981)	16
Northern States Power Company v. Minnesota Public Utilities Commission, 344 N.W.2d 374 (Minn.), *cert. denied sub nom. Humphrey v. Northern States Power Co.*, 467 U.S. 1256, 104 S. Ct. 3546 (1984)	17

Table of Authorities Continued

	Page
Pike County Light and Power Company v. Pennsylvania Public Utility Commission, 465 A.2d 735 (Pa. Commw. Ct. 1983)	16
State ex rel. Utilities Commission v. Nantahala Power and Light Company, 332 S.E.2d 397 (N.C. 1985), *rev'd sub nom. Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986)	9
Administrative Decisions:	
Middle South Energy, Inc., Opinion No. 234, 31 FERC ¶ 61,305 (1985)	*passim*
Middle South Energy, Inc., Opinion No. 234-A, 32 FERC ¶ 61,425 (1985)	*passim*
System Energy Resources, Inc., Opinion No. 292, 41 FERC ¶ 61,238 (1987)	*passim*
System Energy Resources, Inc., Opinion No. 292-A, 42 FERC ¶ 61,091 (1988)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1156

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, JOSEPH I. GIARRUSSO, LAMBERT C. BOISSIERE, JR., MICHAEL EARLY, JAMES SINGLETON, DOROTHY MAE TAYLOR, JOHNNY JACKSON and PEGGY WILSON,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

BRIEF OF EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION OF NEW ORLEANS PUBLIC SERVICE INC. FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in the Appendix ("App.") to the Petition (App. 2A-24A) and is reported at 911 F.2d 993.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") is the nation's association of investor-owned electric utilities.[1] Its members generate approximately 78 percent of all electricity in the nation and serve 74 percent of the nation's electricity users. The ability of many EEI members to provide reliable electric service under rates that are just and reasonable to their customers and to their shareholders depends heavily on a regulatory structure in which the Federal Energy Regulatory Commission ("FERC") and state or local regulatory bodies operate compatibly. Within this structure, only the FERC can serve the vital function of offering a central, neutral forum for resolution of many interstate regulatory disputes by virtue of its authority to issue a decision with respect to wholesale cost allocation and rate issues that is binding on each affected state.

The federal preemption doctrine as applied to this nation's electric utility industry forms a fundamental and essential part of the regulatory structure in which the FERC performs this vital function. The doctrine is set forth in this Court's recent decisions in *Nantahala Power and Light Company v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986) ("*Nantahala*"), and *Mississippi Power & Light Company v. Mississippi ex rel. Moore* ("*MP&L*"), 487 U.S. 354, 108 S. Ct. 2428 (1988). The opinion of the court below is completely opposed to the sound preemption principle of

[1] EEI has obtained consent to file this brief from petitioner and respondents. Consents have been filed with the Clerk of the Court, concurrently with the filing of this brief.

Nantahala and *MP&L*[2] and therefore represents a major threat to a compatible federal-state regulatory structure.

Petitioner, New Orleans Public Service Inc. ("NOPSI"), its operating company affiliates, Mississippi Power & Light Company ("MP&L"), Arkansas Power & Light Company ("AP&L"), and Louisiana Power & Light Company ("LP&L") (collectively referred to hereafter as the "MSU System operating companies"), System Energy Resources, Inc., formerly known as Middle South Energy, Inc. ("MSE" or "SERI"), the owner of a 90 percent interest in Grand Gulf Station Unit No. 1 ("Grand Gulf 1"), and their common parent, Entergy Corporation, formerly known as Middle South Utilities, Inc. ("MSU"), constitute a highly integrated and coordinated electric utility system. All are members of EEI. The MSU System is subject to retail rate regulation in the states of Louisiana, Mississippi, Arkansas, Missouri and the City of New Orleans.

In addition to the MSU System operating companies, most other EEI members throughout the country obtain a portion of their total supply of electrical capacity and energy available to sell to their retail customers through interstate, wholesale purchases from other utilities or from generating companies at rates regulated exclusively by the FERC. Many EEI members, including NOPSI and its sister companies within the MSU System, also participate in interstate, multiparty power pools that include provisions for reciprocal wholesale sales and exchanges of electrical capacity and energy; others have invested in electrical generation projects that are jointly owned by utilities

[2] EEI submitted briefs as *amicus curiae* in both of those cases.

with separate retail service areas. These baseload, generating projects also typically involve large, wholesale sales of power.

Many EEI member companies thus are exposed to a blend of regulation that includes the FERC and at least one state or municipal authority but, quite possibly, may include two or more state or local authorities. This blend of regulation can lead to serious, if not debilitating, ratemaking conflicts absent the enforcement of a properly framed rule of federal preemption. As this Court noted in *Nantahala*, an improper refusal on the part of a state to permit an electric company to pass through wholesale costs that have been approved by the FERC causes a "trapping" of costs.

Trapped costs could threaten the ability of an individual utility to provide adequate and reliable electric service within its defined service area by sapping the financial strength of the victimized utility. In the long run, a utility's customers suffer from any loss of reliability due to financial erosion. Despite this Court's decisions in *Nantahala* and *MP&L*, these conflicts still persist, at least within the Fifth Circuit. NOPSI is suffering from a *Nantahala* trapping of costs that has lasted for virtually six years. Utility managers and federal and state regulators across the nation are watching to see how NOPSI's efforts to overturn this trapping are resolved; and the lower court's decision has profound adverse implications for the nation's electric utility industry if it is sustained.

Therefore, EEI's members have a vital interest in the outcome of this case. EEI urges this Court to grant the Petition and summarily reverse the lower court's decision.

STATEMENT OF THE CASE

From 1974 to 1985 as part of a major supply diversification program on behalf of the MSU System, MSE (now SERI) constructed Grand Gulf 1 for the mutual benefit of NOPSI and the other MSU System operating companies. Since MSE would sell the entire output of its interest in Grand Gulf 1 at wholesale to the MSU System operating companies (for resale by them as part of their general system power supplies), FERC had exclusive and total rate jurisdiction with respect to MSE. In anticipation of commercial operation of Grand Gulf 1, the FERC held lengthy, exhaustive and highly contentious evidentiary hearings during 1983 and 1984. In these hearings, the Council of the City of New Orleans ("Council") and the affected states were given an unfettered opportunity to challenge the allocation of Grand Gulf 1 on all conceivable fronts including prudence. The Council and the states of Louisiana, Arkansas and Mississippi each sought to obtain an allocation of Grand Gulf 1 costs that would have imposed more costs on the other jurisdictions.

In Opinion No. 234, issued in 1985, and subsequent affirming orders ("Opinion No. 234, *et seq.*"),[3] the

---

[3] *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶ 61,305 (1985); Opinion No. 234-A, 32 FERC ¶ 61,425 (1985); *System Energy Resources, Inc.*, Opinion No. 292, 41 FERC ¶ 61,238 (1987); Opinion No. 292-A, 42 FERC ¶ 61,091 (1988). *See also Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated in part*, 822 F.2d 1104, *cert. denied sub nom. Arkansas Public Service Commission v. FERC*, 484 U.S. 985, 108 S. Ct. 500 (1987); *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989), *cert. denied sub nom. State of Mississippi v. FERC*, ___ U.S. ___, 110 S. Ct. 1805 (1990).

FERC ultimately determined a just and reasonable allocation of Grand Gulf 1 investment costs among NOPSI and the other MSU System operating companies. It allocated 36 percent of the large and expensive nuclear unit to AP&L, 33 percent to MP&L, 17 percent to NOPSI and 14 percent to LP&L in order to achieve an approximate equalization of wholesale cost responsibility among the MSU System operating companies. This was in keeping with the highly integrated and closely coordinated nature of the MSU System.

Subsequently, each MSU System operating company sought authorization from its respective retail rate commission to pass through the costs of its FERC-approved portion of Grand Gulf 1 in retail rates. Retail rate settlements consistent with the FERC-approved allocation of Grand Gulf 1 were obtained by AP&L and LP&L and their respective state regulators. MP&L's effort to pass through its share of the FERC-approved costs culminated in this Court's 1988 opinion in *MP&L*. This case arises from NOPSI's effort, commencing almost six years ago, to obtain authorization from the Council to pass through all costs associated with NOPSI's FERC-approved allocation of Grand Gulf 1.

Underneath the layers of federal and state court decisions produced in NOPSI's effort is the Council's February 4, 1988 order[4] refusing to permit NOPSI to recover $135 million of its Grand Gulf 1 costs. The Council's order rests on the misguided grounds that NOPSI was imprudent for failing to "minimize its

[4] See Petition at 7 for a description of this order.

losses" with respect to Grand Gulf 1 during that unit's construction period although the unit itself had been constructed prudently as the FERC found. *MP&L*, 487 U.S. at 375. This disallowance had the effect of reducing NOPSI's Grand Gulf 1 cost responsibility from the 17 percent found reasonable by FERC to 9 percent — the allocation the Council unsuccessfully urged before FERC on non-prudence grounds, since no party including the Council had chosen to raise any serious prudence issue at the FERC. *Id.* at 375.

On appeal, the U.S. Court of Appeals for the Fifth Circuit held that the Council's February 4, 1988 order is not "facially preempted" by FERC's Opinion No. 234, *et seq.* The court held that this Court's prior preemption decisions established only that "FERC had jurisdiction to determine whether [NOPSI and the other MSU utilities] acted prudently in deciding to participate in the Grand Gulf venture" initially and that *MP&L*, *Nantahala*, and other preemption cases had not addressed FERC's jurisdiction to determine prudence "once the Grand Gulf project was underway." 911 F.2d at 1001, App. 16A.

SUMMARY OF ARGUMENT

The Council's order is based on the theory that NOPSI was imprudent in allegedly failing to minimize its losses during the construction of Grand Gulf 1. This theory is a sham designed to evade the clear preemptive effect of Opinion No. 234, *et seq.*, in which the FERC, after giving the Council an unrestricted opportunity to challenge the prudence of Grand Gulf 1 on any conceivable basis, properly allocated a portion of the nuclear unit to NOPSI. In accepting the Council's minimization-of-losses-during-construction-of-

Grand Gulf 1 theory, the lower court's opinion patently violates *Nantahala* and *MP&L* and merits summary reversal.

ARGUMENT

The Opinion Below Is Of Great National Importance Since, In Violating The Preemption Doctrine Of *Nantahala* and *MP&L*, It Threatens The Proper Relationship Between Federal and State Regulation Of The Electric Utility Industry.

Contrary to the erroneous opinion of the court below, there can be no doubt that, in accordance with this Court's recent decisions in *Nantahala* and *MP&L*, the Council's action is preempted by the FERC-approved allocation of Grand Gulf 1 costs. Indeed, the lower court's decision, like the Council's action itself, flouts this Court's application of the preemption doctrine in this very context.

In *Nantahala*, this Court considered the preemptive effect of a FERC rate order that allocated to two affiliated electric companies with a common parent their respective entitlements to a particular power resource (low cost power produced by the Tennessee Valley Authority ("TVA") from hydroelectric facilities) that was available to them pursuant to a joint power supply arrangement. One of the affiliated utilities operated in the state of North Carolina and the other in Tennessee. The two utilities and their parent formed a small interstate electric system similar in nature in many respects to the MSU System.

The North Carolina Utilities Commission ("NCUC") had found that a portion of the North Carolina utility's power purchase costs, in light of the presumed availability of additional lower-cost power from TVA, had been incurred for the benefit of the utility's

shareholders and not for its customers. Therefore, the NCUC assumed that for retail ratemaking purposes it could allocate more lower cost TVA power to the utility than was available to the utility under the FERC's allocation. *State ex rel. Utilities Commission v. Nantahala Power & Light Co.*, 332 S.E.2d 397 (N.C. 1985) *rev'd sub nom. Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986). Thus, the effect was to deny that utility the right to recover a portion of the costs it had incurred in paying wholesale rates that FERC had determined to be just and reasonable.

The North Carolina Supreme Court held that the state's reallocation was well within North Carolina's traditional range of authority (the "historic police powers" rationale of the opinion below, 911 F.2d at 1002, App. 17A) and emphasized that the state had not required the utility to violate FERC's rate order, nor had the FERC's allocation been contradicted directly or indirectly. *See Nantahala*, 476 U.S. at 961-62. This Court rejected those arguments, stating with complete clarity:

> When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . Such a "trapping" of costs is prohibited. Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand.

Id. at 970 (citation omitted).

In *MP&L*, this Court again considered the preemptive effect of a FERC ratemaking order that allocated the costs and electrical output of a jointly available generating resource among affiliated electric utilities. The FERC decision involved in *MP&L* is the same one involved in this case — Opinion No. 234, *et seq.*, which allocated Grand Gulf 1 among NOPSI and the other MSU System operating companies. In *MP&L*, the Mississippi Supreme Court ruled that the state of Mississippi could not permit the pass-through of MP&L's allocated portion of Grand Gulf 1 costs without first reviewing the prudence of management decisions concerning Grand Gulf 1. The Mississippi Supreme Court rejected MP&L's argument that *Nantahala* foreclosed a state prudence review of Grand Gulf 1. This Court reversed the Mississippi Supreme Court, however, and stated that the

> reasoning that led to our decision in *Nantahala* applies with equal force here and compels the same conclusion — States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair.

MP&L, 487 U.S. at 371.

This Court made clear that the boundaries of the prudence inquiry foreclosed to the state of Mississippi were not to be construed narrowly. The Court noted that the Mississippi Supreme Court had based its opinion on the companion conclusions (1) that state regulation was not automatically prohibited as to those matters unresolved by the FERC and (2) that

> FERC "was never presented with the question of whether the completion of Grand Gulf, or its continued operation, was prudent" . . . and that the Court of Appeals in affirming FERC's allocation had "made no finding with regard to prudency *because the issue was not presented.*"

Id. at 368 (emphasis in original) (citations omitted).

This Court stated in response that the Mississippi Supreme Court had erred in adopting the view that the preemptive effect of FERC's allocation order (Opinion No. 234, *et seq.*) turned on whether the prudence of Grand Gulf 1 had been investigated thoroughly and completely in the evidentiary hearings held before FERC. This kind of case-by-case analysis, which was also employed by the court below, was rejected once more by this Court. *Id.* at 374. Citing *Nantahala*, the Court emphasized its rejection by explaining that the state of Mississippi (just as the Council in the context of the instant case) had been given an unlimited opportunity before the FERC to review all aspects of prudence. Plainly, under the principles of *Nantahala* and *MP&L*, a retail ratemaking authority should not be given the latitude to circumvent the preemptive effect of a FERC-approved allocation by creating a presumably unexplored theory of imprudence for the state to investigate.

With *Nantahala* and *MP&L* so recently decided, how then is it possible for the court to have erred in its decision below? As to NOPSI's facial preemption claim, the answer lies entirely within section II.C. of the court's opinion. 911 F.2d at 1001-02, App. 15A-18A.

That crucial section commences with a statement of the correct principle — "*Nantahala* and *Mississippi Power and Light* reaffirmed the well-established prin-

ciple that if FERC has jurisdiction over a subject, states cannot have jurisdiction over it." *Id.* at 1001, App. 15A-16A. The court, however, goes astray immediately thereafter. It incorrectly assumes that this case presents a rational "variation" of the prudence argument that is not governed by *Nantahala* or even by *MP&L*, despite the latter decision's direct factual and legal relationship to this case.

In fact, the court accepts a variation of the prudence argument that is, in all practical terms, merely a contrivance to evade the broad preemption rule of *MP&L*. Recognizing that *MP&L*

> established that FERC had jurisdiction to determine whether the various utilities [including NOPSI] acted prudently in deciding to participate in the Grand Gulf venture, and that the states [including the Council] were therefore precluded from conducting prudence inquiries on that subject,

911 F.2d at 1001, App. 16A, the court states that the pivotal issue is whether the FERC asserted or had jurisdiction to address whether "NOPSI acted prudently [by minimizing its 'losses'] once the Grand Gulf project was underway." *Id.* Virtually without further ado, the court states (1) that "it is plain that FERC did not assert jurisdiction to determine NOPSI's prudence in not acting to minimize its losses [after the Grand Gulf project was underway]," and (2) that "we must presume" that Congress never intended to preempt the Council from exploring this presumably discrete and severable area of prudence. 911 F.2d at 1002, App. 16A-17A.

It is, however, absurd to divide jurisdiction over the prudence issue involving Grand Gulf 1 between the decision of NOPSI "to participate in the Grand Gulf venture" and NOPSI's behavior "once the Grand Gulf project was underway." If investment in the construction of Grand Gulf 1 was prudent as FERC found, then NOPSI had no "losses" to "minimize"; and since the Grand Gulf project remained a prudent investment throughout its construction period, which did not end until 1985, NOPSI's reliance on diversifying its power sources through the Grand Gulf project was legally prudent. No credence should be given to the proposition that during the Grand Gulf 1 construction period, NOPSI should have attempted to dispose of its then undetermined portion of Grand Gulf 1. As this Court stated in *MP&L*:

> As we assumed, it might well be unreasonable for a utility to purchase unnecessary quantities of high cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power. But if the integrity of FERC regulation is to be preserved, *it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for*. Just as Nantahala had no legal right to obtain any more low cost TVA power than the amount allocated by FERC, it is equally clear that MP&L may not pay for less Grand Gulf power than the amount allocated by FERC.

MP&L, 487 U.S. at 373-74 (emphasis added).

Further, in accord with clear FERC precedent, the FERC would not have approved the wholesale recov-

ery of the investment costs of Grand Gulf 1 in 1985 if any party to the FERC proceedings, including the Council, had demonstrated that by then the prudent, least cost strategy for NOPSI and the other MSU System operating companies was concurrently to sell off their allocations of Grand Gulf 1 and to acquire alternative power supplies.[5] The Council's finding that it should have been apparent in 1980 that Grand Gulf 1 power would be so much more expensive than coal-fired power that NOPSI should have sold off its then-contingent interest in the plant (Petition, at 7 n.5) amounts to an indirect refusal of the Council to accept the FERC's decision in Opinion No. 234, *et seq.*

Having accepted the Council's fallacious minimization-of-losses argument at face value, the lower court attempts briefly to support its presumption that the power to investigate this allegedly variant form of prudence is reserved to the Council. In invoking the "historic police powers" argument, however, the court resorts to the same kind of overly broad and unfocused reasoning that this Court rejected in *Nantahala* and *MP&L* (*e.g.*, *MP&L*, 487 U.S. at 369-70). In both those cases, as in this one, FERC ordered a specific allocation of power; it did not merely set a rate for a source of power that the utility in question legally could or could not purchase in accordance with a power purchasing strategy beyond FERC's domain. Thus, notwithstanding the police powers of a state, the FERC allocation must prevail.

Despite repeated reference to one passage from this Court's opinion in *New Orleans Public Service Inc. v. Council of New Orleans*, 491 U.S. 350, 109 S. Ct.

---

[5] See Petition, at 18 n.17, for supporting case citations.

2506 (1989) ("*NOPSI III*"), there is no basis in the passage to excuse the lower court's total breakdown in reasoned analysis. *See* 911 F.2d at 998, 1001, 1003, App. 9A-10A, 15A, 17A. In stating that the Council's action was not "flagrantly" unlawful under the abstention doctrine, this Court did not curtail the substantive reach of either *Nantahala* or *MP&L*, which are in harmony and clearly should control the outcome of this case.[6]

Similarly, the lower court's attempt (911 F.2d at 1002, App. 17A-18A) to support its analytical failure with an analogy to the "perfectly sensible" (106 S. Ct. at 2357) rule of *Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977) ("*Narragansett*"), is also devoid of merit. First, the lower court misinterprets or misquotes the *Narragansett* rule in stating that a state "may deny [FERC-approved] pass throughs because costs have gone down in other areas . . . ." 911 F.2d at 1002, App. 18A. Whether this statement is inadvertent or otherwise, a state may not deny "pass throughs" of FERC-approved costs because costs have gone down in other areas. Under *Narragansett*, a state has the power to deny or limit the amount of a proposed retail rate increase, despite the requirement to pass through FERC-approved wholesale costs, where the utility's costs in other areas have decreased sufficiently to cancel the effect of the required wholesale cost pass-through.

Second, it is inconceivable that the *Narragansett* doctrine of offsetting a FERC-mandated pass-through of wholesale costs with any cost savings "in other

---

[6] The issue in this case was not an issue that was before this Court in *NOPSI III*. 491 U.S. at 350-352.

areas" can be construed to aid either the Council's contrived theory of minimizing losses attributable to Grand Gulf 1 or the lower court's countenance of the theory. "Other areas" clearly means other, discrete cost areas. Thus, in the context of this case, it would refer to such costs, for example, as NOPSI's non-Grand Gulf 1 operation and maintenance expenses or NOPSI's cost of borrowing funds or obtaining equity capital.

Third, in stating that, "it seems logical that [states] should be able to deny [pass-throughs] because costs would have gone down if the utility had not been imprudent," 911 F.2d at 1002, App. 18A, the lower court's logic seems to rest less on *Narragansett* than on the principle of *Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735 (Penn. Commonwealth Ct. 1983) ("*Pike County*") — that, in the absence of a FERC-approved allocation of power, a state may disallow the costs incurred under a FERC approved rate where a cheaper power source was available. *MP&L* makes clear, however, that the *Pike County* principle is also inapplicable in this case, 487 U.S. at 373-74, where there is an explicit FERC-approved allocation of power. Although the lower court recognized the inapplicability of *Pike County* earlier in its opinion (911 F.2d at 1000, App. 14A-15A), it overlooked this point in the crucial part of its opinion.

Finally, the opinion below is inconsistent with supreme court preemption decisions from the states of Massachusetts, North Dakota and Minnesota that, while decided earlier in time, are entirely consistent with *Nantahala* and *MP&L*. *See Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981); *Eastern Edison Co. v. Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1983); *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn. 1984). These cases clearly establish that the overwhelming weight of judicial authority supports repudiation of the Council's attempt to disallow Grand Gulf 1 costs despite FERC's determination that Grand Gulf 1 should be allocated in its entirety among the MSU System operating companies.

Despite *Nantahala, MP&L* and these cases, if the lower court's decision is affirmed, then other retail ratemaking bodies throughout the country almost certainly will be encouraged to adopt similar rationales for undermining the preemption doctrine as it is meant to be applied in the electric utility industry.

CONCLUSION

The Court should grant the Petition and reverse summarily the opinion below.

Respectfully submitted,

Of Counsel:

REID & PRIEST
RICHARD M. MERRIMAN
ROBERT S. WATERS
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-4000

PETER B. KELSEY
Vice President, Law and
Corporate Secretary
Counsel of Record

EDWARD H. COMER
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2696
(202) 508-5000

Attorneys for Edison Electric Institute

February 1991